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IN THE
COURT OF APPEALS OF INDIANA

WALLY ZOLLMAN, M.D. and ZOLLMAN SURGERY CENTER, INC.,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A02-0605-CV-368
SHELLEY OOLEY,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0204-CT-635

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary

Wally Zollman, M.D., and The Zollman Surgery Center, Inc., ("Dr. Zollman" or collectively, "Zollman") appeal from a judgment in favor of Shelley and Michael Ooley ("Ooley"). Ooley's complaint sought recovery for medical malpractice in connection with a surgical procedure Shelley underwent known as "suction assisted lipectomy" or liposuction. The trial court entered judgment on the jury's verdict and award of $50,000 in damages in favor of Ooley. Zollman now appeals, challenging the trial court's denial of Zollman's motions for judgment on the evidence on the issues of civil battery based on a lack of informed consent and negligence in the performance of the surgery. Zollman also challenges the trial court's ruling preventing Zollman's expert witness from testifying about conversations he had with other healthcare providers to form the basis of his expert opinion. Concluding the trial court did not err on these issues, we affirm.

Facts and Procedural History

Shelley Ooley, a 33 year old female, sought consultation with Zollman regarding liposuction surgery on her legs in May of 1996. Ooley went to The Zollman Surgery Center for evaluation. She viewed a videotape on liposuction and received information relevant to the surgery from members of the surgery center staff. She signed an acknowledgment form, verifying that she had viewed the videotape. She also completed a medical history document, met with Dr. Zollman and read and signed the informed consent for liposuction document. In addition, she reviewed and signed a pamphlet entitled "Liposculpture."

On June 14, 1996, Ooley went to The Zollman Surgery Center for her liposuction surgery, and met with Dr. Zollman. She reviewed and signed another form that included

the following authorization:

> As a patient in The Zollman Surgery Center, Inc., I authorize Dr. Zollman and whomever he/she designates as his/her assistants to administer such treatment as necessary and to perform the following operation(s):

Appellant's Appendix at 523. Thereafter, the surgery was performed by Dr. Zollman, assisted by Certified Surgical Technician Rex Haller.

Ooley later learned that Haller, a non-physician, had performed a part of the surgery. Ooley filed her complaint against Zollman, alleging that Zollman was negligent in failing to obtain her informed consent for the liposuction procedure, in failing to perform the liposuction procedure appropriately, in failing to provide appropriate follow-up care and treatment, and in committing a civil battery.

The matter was submitted to a medical review panel consisting of three physicians pursuant to Indiana's Medical Malpractice Act. The medical review panel issued the following opinion concerning Ooley's claim against Zollman:

> The evidence supports the conclusion that [Zollman] failed to comply with the appropriate standard of care as charged in the Complaint. The conduct complained of was not a factor of the resultant damages.
>
> [T]here is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the Court or jury.
>
> The name of [Zollman] should not be forwarded to the appropriate board of professional registration for review of their fitness to practice their profession.

Appellant's App. 530-32.[1]

[1] At trial, Dr. Eppley, one of the physicians who served on the medical review panel, stated the panel's opinion that there was a deviation from the standard of care and that deviation was a material issue of fact. Appellant's App. at 319. The questions of fact were as to informed consent, the use of a surgical technician during the procedure, and whether Dr. Zollman was present during the entire procedure. Id. at 319-20. Because of these issues of fact, the panel decided not to forward the name to

A jury trial was held in March of 2006. At trial Dr. Barry Eppley, a plastic surgeon at the Indiana University Medical Center who served on the medical review panel, testified that a "med tech" should not be allowed to perform aspiration or infusion in a surgical procedure. Id. at 323. He further stated that a patient should be informed if anyone other than the listed surgeon is performing a part of the surgery, that to not advise a patient of such information is below the standard of care, that informed consent includes a description of the nature of the procedure, and that a description of the procedure would include "who would be performing the procedure." Id. at 325, 326, 383.

At the close of Ooley's case, Zollman moved for judgment on the evidence on several issues, including the civil battery claim and the propriety of the actual performance of the liposuction surgery. The trial court denied these motions. Zollman then presented evidence on his own behalf but did not renew his motion for judgment on the evidence at the close of the evidence. The jury returned a verdict in favor of Ooley and against Zollman and awarded damages in the amount of $50,000.00. The trial court entered judgment on the jury's verdict for that amount. Zollman now appeals.

Discussion and Decision

I. Denial of Motion For Judgment On the Evidence

A. Standard of Review

We first note Zollman appeals from a negative judgment. When a party appeals from a negative judgment, he must demonstrate that the evidence points unerringly to a conclusion different from that reached by the trial court. We will reverse a negative judgment only if the

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the appropriate board for review of fitness. Id. at 321.

decision of the trial court is contrary to law. In determining whether a trial court's decision is contrary to law, we must determine if the undisputed evidence and all reasonable inferences to be drawn therefrom lead to but one conclusion and the trial court has reached a different one. Newson v. State, 785 N.E.2d 1155, 1157-58 (Ind. Ct. App. 2003).

Further, we note that at the conclusion of Ooley's case, Zollman moved for judgment on the evidence and the trial court denied that motion. On appeal, Zollman argues that the trial court erred by denying his motion for judgment on the evidence. However, following the trial court's denial of Zollman's motion for judgment on the evidence, Zollman introduced evidence, but did not renew his motion for judgment on the evidence at the close of evidence. Therefore, Zollman has arguably waived any appeal of the denial of the motion for judgment on the evidence based on the subsequent presentation of evidence. Davidson v. Bailey, 826 N.E.2d 80, 87 n.9 (Ind. Ct. App. 2005) (defendant waives any alleged error regarding denial of a motion for judgment on the evidence when he moves for judgment on the evidence and then introduces evidence on his own behalf after the motion is denied); Ind. Trial Rule 50(A)(6) ("error of the court in denying the motion shall be deemed corrected by evidence thereafter offered or admitted."). However, this claim may be addressed as a challenge to the sufficiency of the evidence. Jamrosz v. Resource Benefits, Inc., 839 N.E.2d 746, 757-58 (Ind. Ct. App. 2005), trans. denied, (where defendant made motion for judgment on the evidence at trial but argument on appeal was based on arguments not specifically included in motion to trial court, defendant waived two of arguments on appeal but sufficiency argument would be addressed).

In reviewing the sufficiency of evidence, we will decide whether there is substantial

evidence of probative value supporting the judgment. Jamrosz, 839 N.E.2d at 758. We neither weigh the evidence nor judge the credibility of witnesses but consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. Davidson, 826 N.E.2d at 87. "The verdict will be affirmed unless we conclude that it is against the great weight of the evidence." Id.

B. Informed Consent

Zollman challenges the trial court's denial of the motion for judgment on the evidence on the basis Ooley gave an informed consent for Zollman to perform the liposuction surgery. Zollman emphasizes that Ooley signed a written consent and authorization permitting "Dr. Zollman and whomever he/she designates as his/her assistants" to perform the liposuction procedure. Dr. Zollman and his designated assistant performed the procedure. Zollman points out Ooley testified that Dr. Zollman never represented that he alone would perform the liposuction and that she never requested that he alone perform the liposuction. As such, Zollman argues the touching of Ooley during the procedure could not have been an "unconsented to" touching and the trial court should have granted the motion for judgment on the evidence.

Ooleys' complaint alleged that Zollman "negligently failed to perform" the surgery "in the manner in which he agreed to perform said surgery and in the manner in which he represented and advertised" and further that he "misrepresented" to Ooley "the extent, scope and nature of surgical procedures" and "misrepresented the reasonable expectations" for the surgery performed on Ooley "in obtaining her consent" to the surgery and "therefore failed to obtain her informed consent to the procedures." Appellant's App. at 10. Further, the

complaint alleged that Zollman "failed to inform or disclose" to Ooley that the surgery "would not be and were not, performed by a skilled, experienced plastic surgeon, but would be and were, in whole in part, performed by an unlicensed non-physician." Id. at 11. As a result of Zollman's failure to fully inform and disclose essential facts and in "misrepresenting" the nature and extent of procedure used, Ooley underwent treatments and procedures which she otherwise would not have undergone or consented to had full and complete disclosure been made by Zollman. Id. at 11-12.

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." Mullins v. Parkview Hosp., Inc., 865 N.E.2d 608, 610 (Ind. 2007) (citing Restatement (Second) of Torts § 13 (1965)).

In Mullins, our supreme court recently considered a patient's suit for battery where an emergency medical technician ("EMT") student performed an intubation procedure, incorrectly, at the outset of the surgery. The patient had crossed out two portions of the consent form before she signed it, and in particular crossed out "I consent to the presence of healthcare learners." 865 N.E.2d at 610.

The supreme court considered whether the EMT student had an obligation to obtain, or to inquire into, the patient's consent to intubation under which the anesthesiologist was acting. The court determined the student was under no obligation to obtain consent herself or inquire into the consent and could rely on her previous experience attempting to intubate a patient that day, her preceptor's direction, and the doctor's authority as the anesthesiologist

for the surgery. Id.

Further, the court noted the lack of consent would not independently raise the harmful touching to the level of a battery. Id. While the court ultimately allowed the battery claim against the surgeon and the anesthesiologist to go forward, it determined that the EMT student could not be sued for her participation in the procedure. The court determined that the EMT student did not intend to harm the unconscious patient during the failed attempt at intubation and therefore, did not commit battery. Id.

The instant case presents similar issues. Ooley claims Zollman committed battery on her because parts of the procedure were performed by Zollman's certified surgical technician, and she did not consent to a non-physician performing any part of her procedure. She emphasizes Zollman failed to disclose that the surgical technician would perform part of the surgery. Further, she asserts she would not have undergone or consented to the procedure had full disclosure been made by Zollman.

As Ooley points out, the Zollman Surgery Center form she signed does not indicate that anyone other than a licensed physician would perform the surgical procedure. The pamphlet she signed also did not inform her that a non-physician would perform portions of the procedure and instead encourages the patient to trust the skill and judgment of the surgeon performing the procedure.

Ooley did sign a Zollman Surgery Center form, which included language authorizing Dr. Zollman "and whomever he/she designates as his/her assistants" to perform the operation. However, as Ooley points out, that form also referred to the release of information to third parties and financial responsibility and this was the only reference to the use of

assistants for any purpose. Further, this form was not presented with other consent forms at the time of the consultation, but rather was presented the day of surgery. Dr. Zollman never orally advised Ooley that a non-physician would be performing parts of the actual surgical procedure. Further, another surgeon, Dr. Eppley, testified that patients would not find it acceptable for a non-physician to perform their surgery and that he "would not have a patient" if he advised a patient that a non-physician would be doing part of the surgery. Appellant's App. at 337.

Further, Ooley now argues, at the time of the surgery, allowing a non-physician to perform part of the surgery would violate 410 IAC 15-2-9(2). Thus, she asserts, had Dr. Zollman informed Ooley, he would have been admitting a violation of his medical license. From this, Ooley argues, it can be reasonably inferred that Dr. Zollman intentionally withheld from her the fact that he would be allowing a non-physician to perform the surgery.

The burden falls on a physician to obtain a patient's consent for treatment. Mullins, 865 N.E.2d at 610. "Under the doctrine of informed consent, a doctor must disclose the facts and risks of a treatment which a reasonably prudent physician would be expected to disclose under like circumstances and which a reasonable person would want to know." Hamilton v. Ashton, 846 N.E.2d 309, 317 (Ind. Ct. App. 2006), reaff'd on reh'g, 850 N.E.2d 466 (Ind. Ct. App. 2006), trans. denied.

> The doctrine of informed consent is based upon the patient's right "to intelligently reject or accept treatment." Revord v. Russell, 401 N.E.2d 763, 767 (Ind. Ct. App. 1980). Indiana law recognizes the duty of a physician to make a reasonable disclosure of material facts relevant to the decision the patient is required to make. Culbertson v. Mernitz, 602 N.E.2d 98, 101 (Ind.

1992) (citing Joy v. Chau, 177 Ind.App. 29, 39, 377 N.E.2d 670, 676-77 (1978)).

Auler v. Van Natta, 686 N.E.2d 172, 174 (Ind. Ct. App. 1997), trans. denied. "Unconsented to surgery is in the nature of a battery and is malpractice." Bowman v. Beghin, 713 N.E.2d 913, 917 (Ind. Ct. App. 1999).

Unlike the EMT student in Mullins who was under no obligation to obtain consent herself or inquire into the consent under which the doctor was acting, Zollman did have a duty to obtain Ooley's informed consent for treatment. "Failure to obtain informed consent in the medical context may result in a battery." Mullins, 865 N.E.2d at 610. We are persuaded that evidence was submitted from which the jury could have concluded that Ooley did not consent to her operation being performed by a non-physician. We hold that Zollman has failed to demonstrate that the evidence points unerringly to a conclusion different from that reached by the trial court. Ooley presented evidence that Zollman did not specifically disclose that a non-surgeon would be performing part of the surgery, and Dr. Eppley testified that the failure to disclose was below the standard of care. Here, the trial court correctly determined there was sufficient evidence presented from which the jury could find Zollman failed to secure Ooley's fully informed consent.

Zollman also challenges the evidence supporting the issue of negligence in the performance of the surgery, arguing that the procedure did not cause any physical damage to Ooley. Zollman states part of the claim of malpractice was that the surgical procedure was performed negligently but Ooley did not present any expert testimony that the procedure was performed negligently and the expert testimony was to the contrary.

To support this argument, Zollman cites Hamilton v. Ashton, 850 N.E.2d 466. In that case, we held that the trial court did not err in granting partial summary judgment to the doctor on the issue of his negligence in the performance of surgery, noting that the claim for lack of informed consent was distinct from the claim regarding techniques used in the surgery. Id. at 467. We stated:

> We do not disagree with Hamilton's assertion that surgery performed without informed consent is malpractice, and neither the trial court nor this court has placed any impediment to Hamilton's ability to pursue her claim for lack of informed consent. In asserting that "if a doctor is negligent in obtaining informed consent for surgery, he is negligent in performing the surgery," Hamilton fails to recognize the distinction we have made between the fact of a surgery being performed and the manner in which the surgery is performed.
>
> If there is no informed consent, the patient has a claim for the fact of the surgery occurring. Within the larger context, if the techniques used in the surgery were themselves negligent, there may also be an independent claim for the manner in which the surgery is performed. Hamilton has raised an issue only with regard to the fact of the surgery, alleging that she was not apprised of the known risk of a facial nerve injury occurring as a side effect of the procedure Dr. Ashton performed. She has not also raised an issue that the facial nerve injury was caused by negligence in the manner in which Dr. Ashton performed the surgery.

Id. Zollman asserts Hamilton compels the same conclusion here.

However, Ooley's claim was for failure to perform the surgery appropriately, based on the undisclosed use of a non-surgeon. Ooley's complaint shows a claim objecting to Zollman's performance of the surgery, given Zollman's failure to secure an informed consent.

A claim alleging the failure to obtain informed consent has elements of both battery and negligence. Cacdac v. West, 705 N.E.2d 506, 512 (Ind. Ct. App. 1999), trans. dismissed. The greater the physician's failure, the more akin to battery; the lesser the failure, the more

akin to negligence. Id.

In addressing Zollman's motion for judgment on the evidence, Ooley emphasized to the trial court that the argument relating to the standard of care in the performance of the surgery went to the situation where the surgery was performed by a non-surgeon. Appellant's App. at 423. As Ooley submitted evidence from which the jury could conclude that she did not consent to her operation being performed by a non-surgeon, based in part on the lack of informed consent, we cannot say there is no substantial evidence or reasonable inference from the evidence supporting the negligence claim.

II. Admissibility of Evidence

A. Standard of Review

The standard of review for admissibility of evidence issues is abuse of discretion. Walker v. Cuppett, 808 N.E.2d 85, 92 (Ind. Ct. App. 2004). An abuse of discretion occurs if the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Id. Even if a trial court errs in a ruling on the admissibility of evidence, this court will only reverse if the error is inconsistent with substantial justice. Id.

B. Expert Testimony

At trial, Zollman presented the expert testimony of plastic surgeon Dr. Bradley Thurston. Dr. Thurston testified that in his opinion it did not fall below today's standard of care to allow a "scrub tech" to do portions of the operation, under direct supervision. Appellant's App. at 450. Dr. Thurston was asked about what he did to formulate his opinion in this case. He stated that he had heard that the case had an "unfavorable Panel." Id. at 443. He further stated, "[I]t caused me a lot of anguish because I see that what he is doing is

similar to what I've been doing for years, and some of my colleagues thought that that might have been inappropriate. So I know what I do in my practice – I don't really know what other people do in their practices. So I spent an inordinate amount of time talking to everyone I could talk to, to find out what happens in their practices. A lot of physicians and surgeons were not willing to tell me how much they delegated out." Id. He also stated he spoke with other physicians and hospital administrators in the community to find out what the standard was with respect to utilization of a certified surgical technician and other assistants to perform parts of a procedure. Id. at 443-44.

At trial, the court refused to allow Dr. Thurston to inform the jury as to what the others had advised him on this issue. Zollman complains the trial court improperly prevented Dr. Thurston from testifying about the details of the conversations he had with other healthcare providers as this information formed the basis of his expert opinion. Zollman asserts Dr. Thurston proposed to testify that in discussing the issue with other healthcare providers, he had been told that it was in fact standard practice that non-physicians were allowed to perform parts of surgical procedures, as along as it was under the direction and supervision of the lead surgeon. Zollman asserts the testimony should have been allowed as it was offered only to establish what formulated his expert opinion and not to prove the truth of the matter, citing Schmidt v. State, 816 N.E.2d 925, 938-39 (Ind. Ct. App. 2004), trans. denied.

> Rule 703 of the Indiana Rules of Evidence provides:
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible

> evidence, provided that it is of the type reasonably relied upon by experts in the field.

Thus, Rule 703 allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion. As Zollman points out, an expert may offer his opinion based on otherwise inadmissible evidence provided the expert has sufficient expertise to evaluate the accuracy and reliability of the information, the report is of the type normally found reliable, and the information is of the type customarily relied upon by the expert in the practice of his profession. Mundy v. Angelicchio, 623 N.E.2d 456, 463 (Ind. Ct. App. 1993). However, the basis of Dr. Thurston's opinion was apparently an informal poll of other healthcare providers. Rule 703 allows that experts may testify to opinions based on inadmissible evidence, provided that such inadmissible evidence is of the type normally relied on by experts in the field. Here, no evidence was offered to show that the opinions upon which Dr. Thurston relied were evidence of the type reasonably relied on by experts in the field to form opinions regarding standard of care. Further, Zollman did not offer evidence suggesting that his sampling of healthcare providers was statistically valid or substantively sound. Rather, Zollman merely attempted to admit the opinions of other alleged experts by way of Dr. Thurston's testimony.

Zollman has not shown the trial court abused its discretion by excluding Dr. Thurston's testimony regarding conversations he had with others as a basis for his opinion that Zollman did not deviate from the applicable standard of care. The prejudicial effect of such testimony warrants the trial court's ruling on this issue. Further, the trial court properly allowed Dr. Thurston to offer his opinion formed after talking with other healthcare

providers. Because the trial court's actions were neither clearly erroneous nor against the logic and effect of the facts and circumstances before the court, we hold that the trial court did not abuse its discretion.

Conclusion

As Ooley presented evidence from which a jury could have found that any consent was not informed, the trial court did not err in denying Zollman's motions for judgment on the evidence. Further, the trial court did not abuse its discretion in preventing Dr. Thurston from testifying as to conversations he had with other healthcare providers. Accordingly, we affirm.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.